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Supreme Court, U.S.
FILED

No. _____

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In The

Supreme Court of the United States

MEGHAN BUSSELL,

Petitioner,

v.

MOTOROLA, INC., a Delaware corporation
and ADECCO EMPLOYMENT SERVICES, INC.,
a Delaware corporation,

Respondents.

On Petition For Writ Of Certiorari
To The Eleventh Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

There is a split in the circuits (and within the Eleventh Circuit) concerning what evidence constitutes "direct evidence" for purposes of proving discrimination under Title VII of the Civil Rights Act of 1964, and what the proper definition, use, and effect of "direct evidence" is at the summary judgment stage of an employment discrimination case (*e.g.*, whether such evidence requires denial of summary judgment). Should that split be resolved, and did the Eleventh Circuit err by not finding that the following evidence constituted direct evidence of retaliation and/or constructive discharge: Bussell's supervisor (Karge) told her she would not be given a permanent position with increased pay and benefits because she "complained too much" about sexual harassment; Karge made a notation in Bussell's termination documents that she "[r]esigned due to continuing harassment"; a different management official testified that Bussell "was forced out due to continuing harassment"; and Motorola admitted to the EEOC that the harassment Bussell endured violated its anti-harassment policy and issued a separate finding that it did as well?

II.

Should this Court resolve a split in the circuits that has resulted concerning the interpretation of *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405 (2006), which held that any activity reasonably likely to dissuade a reasonable employee from engaging in protected activity (complaining of sexual harassment) is

QUESTIONS PRESENTED – Continued

actionable retaliation, in that case, suspension with pay and reassignment to an undesirable position? In this case, the Eleventh Circuit held that constructive discharge, being docked in pay, having a workload increased 3-5 times, being called a "liar" and a "baby" when she would complain about sexual harassment, and the failure to be promoted are all not actionable adverse employment actions for purposes of Title VII's anti-retaliation clause. The Eleventh Circuit has issued previous panel opinions pre-*White* that hold that those adverse employment actions are actionable, and the other circuits have as well. This Court asked the Eleventh Circuit to review its opinion in light of *White*, and the Eleventh Circuit held that *White* does not require the conclusion that any of the alleged adverse employment action is actionable, because *White* is limited to situations in which retaliation occurs beyond or outside of the workplace, and that the adverse employment action was not material enough; however, other circuits have held that *White* lowers the bar as to what adverse action is materially adverse (including the adverse action in this case) and uses an objective standard to judge materiality.

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OPINIONS BELOW

The decision of the Eleventh Circuit Court of Appeals affirmed the Southern District Court of Florida's Order Granting Defendants' Motions for Summary Judgment, and it is unpublished. The district court's Order Granting Defendants' Motions for Summary Judgment is unpublished. The Eleventh Circuit denied rehearing, which was also unpublished.

This Court granted *certiorari*, vacated the judgment, and reversed the Eleventh Circuit, ordering the Eleventh Circuit to reconsider its decision in light of *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006). The Eleventh Circuit in an unpublished opinion held that the White case does not affect Bussell's case. Upon petition for rehearing and rehearing *en banc*, the Eleventh Circuit declined review.

STATEMENT OF JURISDICTION

The opinion of the Eleventh Circuit Court of Appeals was rendered on December 21, 2006. App. 1a. Rehearing was denied on January 27, 2007. App. 33a. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964 (as amended)

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

42 U.S.C. § 2000e-2(a)(1).

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m).

On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court –

> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

42 U.S.C. § 2000e-2(g)(2)(B).

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STATEMENT OF THE CASE

On January 3, 2002, Meghan Bussell, ("Bussell"), a nineteen-year-old female, filed a Complaint in the United States District Court for the Southern District of Florida, bringing three causes of action (sexual harassment, retaliation, and termination/constructive discharge), pursuant to 42 U.S.C. § 2000e *et seq.* (Title VII of the Civil Rights Acts of 1964, as amended) and *Florida Statutes* § 760.01 *et seq.* (the Florida Civil Rights Act of 1992). (R1-1-1).

Following the close of discovery, the Defendants moved for summary judgment as to all claims in May, 2003. (R2-68, 72, 75). Bussell timely responded to the motion (R2-92-116) and the Defendants replied. (R3-120, 122). On August 22, 2003, the Court heard oral argument on the Defendants' Motions. (R4-173). On March 29, 2004, the district court entered an Order Granting Defendants' Motions for Summary Judgment as to all claims, holding that Bussell could not establish that the sexual harassment was sufficiently severe and pervasive to constitute actionable sexual harassment, and could not establish a retaliation claim or constructive discharge claim. (R3-153). Bussell timely appealed the order granting summary judgment, but a three-judge panel affirmed the decision on July 13, 2005.

Bussell was employed by Adecco and assigned to Motorola's Plantation, Florida facility. Motorola and Adecco co-employed Bussell. During all material times, Bussell's Adecco immediate supervisor was Tom Karge and her Motorola immediate supervisor was Laila Pennington. Karge's supervisor was Kathy Brodeur, and Pennington's supervisor was Ana Martinez (Service Center Manager).

Motorola's Human Resources Administrator, who became involved in this case toward the end of it, was Marcy Covington.

Bussell began working for the Defendants in May-June, 2000; Bussell was assigned to the Motorola's IDEN factory, and she worked on the Defendants' assembly line putting together cellular telephones, tuning them, and testing the buttons. (R2-109-25, 30-31). At the time Bussell started work, she was 19 years old. (R2-109-7). In July or August, 2000, Bussell was moved upstairs to Motorola's Inpact Center to work the first shift assembling police radios. (R2-109-35, 45). The primary sexual harasser was Bob Render; Jason Wells was involved in one incident.

Bussell began to be exposed to sexually-charged comments by Bob Render as soon as she came to the Inpact Center in August, 2000. (R2-109-54-55). Render spoke loudly, and constantly demeaned women, talking about the sex that he had the night before, about how he cheated on his wife, the strip clubs that he would go to, the shape of the women's bodies, and how many girlfriends that he had on the "side", and he uttered "come-ons" to Bussell. (R2-109-50-53; 62-63).

When Render first touched Bussell (in October, 2000), Bussell "was bending down to one of the shelves to get the [Nextel] phones, which we called radios off the shelf to take them back to my desk to assemble them." (R2-109-63-64). Bussell described the first time that Render touched her as follows:

> I was bending over picking up the radios when I felt someone pulling the back of my pants down and the top of my shirt up, and like pulling – I

mean, like, not just pulling a little bit, like grabbing down and yanking my shirt up. . . .

* * *

A: When he pulled my pants down, he said [something to me].

Q: Nothing else?

A: No.

Q: Did he make any comment about your body, your buttocks or –

A: He didn't need to, he was touching it. . . . [H]e had to touch my body to get my clothes. My clothes weren't just like loose off of me. So, to rip down my pants, he's touching my lower back and my butt; and to rip up my shirt, he's touching my back.

* * *

Q: Okay. . . . You mean that he pulled down your pants and underwear?

A: Yes.

Q: Was it actually visible? I mean did you feel that?

A: He pulled my pants down. I mean his fingers were in the back of my pants and he pulled them down. My tattoo goes really far, pretty far down; and, yes, my pants were pulled down, so there was part of –

Q: Your buttocks were showing?

A: Yes.

Q: Was he also grabbing your shirt at the same time?

A: Yes.

(R2-109-77-78, 109-10; R2-110-350-51).

This sexual assault was also physically violent, as Bussell testified that when Render ripped her pants down he was touching her bare bottom, as follows:

> A: When he pulled my pants down, he said [something to me].
>
> Q: Nothing else?
>
> A: No.
>
> Q: Did he make any comment about your body, your buttocks or –
>
> A: He didn't need to, he was touching it. . . . [H]e had to touch my body to get my clothes. My clothes weren't just like loose off of me. So, to rip down my pants, he's touching my lower back and my butt; and to rip up my shirt, he's touching my back.

(R2-109-109-10).

After Render pulled Bussell's pants down, and after a sexual harassment meeting was held, Render continued to sexually touch Bussell against her will. (R2-109-81-82). Render "began on a constant basis" to walk behind Bussell and rub his crotch up against Bussell's body. (R2-109-81). Bussell further described this sexually harassing touching as follows:

> But I would be sitting down and he would walk by and I could feel his pants and the contents rubbing up against my shoulder. I would turn around and he would wink at me funny or smile at m\ funny, and I would get grossed out. . . .

Q: [D]id he literally turn his body sideways to place his genitals against you?

A: Yeah, if you want, I'll show you what he did.

* * *

Q: Okay. But did you go to anyone, any supervisor and say to anyone, hey, he just rubbed his genitals up against me?

A: Yeah . . . any time an incident would happen, I would go to Tom.

(R2-110-305-06-08). Render would also stand behind Bussell and look down Bussell's shirt at her breasts. (R2-110-305). Render also sexually harassed Bussell with his verbal comments, as *he would tell her on a daily basis* that: her hair was getting really long, and that it was growing so fast because she was sexually active; why would you want to be with a boy when you could be with a man; he made sexual comments about her lips, like "wow, those are some pretty thick lips"; he called Bussell "dirty names"; he complimented Bussell on her breasts, and how every part of her body was exactly how he liked it. (R2-110-311; R2-109-165). The severity and perversity of the sexual harassment left Bussell traumatized, as she would not be able to sleep, and she would cry all night long. (R2-109-123, 120, 71, 94, 116, 160; R2-110-214, 244, 244-45, 270-71, 297, 301).

It is not in dispute that Bussell properly complained about the sexual harassment. (R2-112-127-28). Karge conceded that Bussell told him that she thought Render's sexually harassing comments were directed at her. (R2-112-130).

Although Bussell testified that she complained to Pennington constantly (as set forth above), Pennington testified that Bussell only complained to her on two occasions. (R2-116-58-59). Pennington performed absolutely no investigation of Bussell's complaints, and she denied that she knew that there was any harassment occurring. (R2-116-48, 49, 60).

Covington conceded that the offensive comments that Bussell's co-workers told her Render was uttering created a hostile work environment, as follows:

> Q: Do you think it [Render's comments] creates a hostile work environment. [objections omitted]
>
> A: Yes. . . .
>
> Q: Yes. And did you find that there was, indeed, a hostile work environment where Meghan worked [objections omitted]
>
> A: Yes.

(R2-95-118-19).

On January 24, 2001, Motorola HR drafted an Incident Report which contained the following findings as to Render:

> Upon investigation that was conducted regarding allegations in the INPACT CENTER, it was verified that on numerous occasions you used inappropriate, foul and abusive language intimidating others in the conversations you were holding.
>
> In your meeting with Human Resources dated 1/19/01, you admitted that you made inappropriate comments. This constitutes a Class II infraction, contributing to a hostile/intimidating work

> environment and is in violation of Motorola Policy.

(R2-93-Ex.20).

Motorola's Statement to the EEOC stated that "Render was given an incident warning and put on probation for a one year period with the understanding that any further violations of the sexual harassment policy would result in his immediate termination." (R2-116-180-81). Martha Jaramillo, a high-level management official of Motorola, who was the ultimate decision-maker concerning the discipline and resolution arising out of Bussell's complaints, testified that Render "created a hostile work environment discussing strip clubs and making comments and unwanted words." (R2-97-100).

In Karge's findings concerning the sexual harassment allegations, Karge found, on January 29, 2001, as follows: "hostile work environment Reason: Work Conditions was the reason. Resigned due to continuing harassment, and being made to feel uncomfortable. Because the sexual harassment case was so drawn out and not alot [sic] of support in her dept [sic] which was causing her to get ill. . . . " (R2-93-Ex.21) (dated Feb. 2 and 15, 2001). Karge testified that these conclusions were his own, and he agrees with them. (R2-112-173-74).

Direct evidence of retaliation exists, because Karge told Bussell that she was not going to be made a permanent Motorola employee (a "Motorolan") "because [she] complained too much." (R2-109-159). On pages 268 and 168, Bussell testified that "Karge told [Bussell] . . . that [she would not be a permanent Motorola employee] because she was complaining. . . . " (R2-110-268, 168).

Motorola admitted on page 48 in its Brief that Bussell was docked pay. Bussell lost income because of illness brought on by the sexual harassment, and because of the illness she was sent home without pay. (R2-109-159-62) (indicating she was sent home without pay even in January, 2001, after her complaints became known to Motorola HR, that she was sent home without pay on January 19 and 31, 2001). Bussell missed out on being made a permanent Motorola employee because of her complaints, and the greater pay and health care benefits associated with that permanent employment. (R2-159, 168, 169; R2-110-265). Bussell was given more than 3-5 times the work as similarly situated co-workers were given, shortly after her sexual harassment complaints. (R2-109-189-90, 193-94; R2-110-220, 260-64).

Karge told Bussell that he would "write a letter that says it was a forceful quit . . . [t]hat [Bussell] was forced to leave my job because of unhealthy circumstances, because they couldn't protect her from sexual harassment, [and] because they couldn't protect [Bussell] from retaliation. . . ." (R2-109-127). Kathy Brodeur did not allow Karge to give such a letter to Bussell. (R2-110-212-13). Brodeur (one of Adecco's managers) testified that Bussell did not quit. (R2-99-92). Brodeur believes that Bussell was essentially forced out of her employment "due to continuing harassment." (R2-99-168).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW PRESENTS AN IMPORTANT, BUT UNANSWERED QUESTION CONCERNING THE DEFINITION, USE AND EFFECT OF "DIRECT EVIDENCE" IN AN EMPLOYMENT CASE AND THERE IS A SPLIT IN THE CIRCUIT COURTS OF APPEALS REGARDING THIS ISSUE.

In order to establish an employment discrimination case, a plaintiff may use one or more of three methods: 1) presenting direct evidence of discriminatory intent; 2) meeting the burden-shifting test set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); or 3) through statistical proof of a pattern and practice of discrimination. *Standard v. A.B.E.L. Serv., Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998).

Whether evidence is direct or circumstantial evidence is a critical distinction in an employment discrimination case because the *McDonnell Douglas* framework is inapplicable where there is adequate direct evidence of discriminatory intent. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (O'Connor, J., concurring). Also, under the *Price Waterhouse* framework, a proffer of direct evidence shifts the burden of proof to the defendant-employer, who must then prove, notwithstanding the direct evidence, that it would have terminated the plaintiff anyway. *Ferrill v. The Parker Group, Inc.*, 168 F.3d 468, 472 (11th Cir. 1999); *Evans v. McClain of Georgia, Inc.*, 131 F.3d 957, 962 (11th Cir. 1997). Finally, this burden shift to the defendant-employer is important because the proffer of direct evidence, viewed in the light most favorable to the non-moving party, necessarily creates a genuine issue of

material fact that precludes summary judgment. *Seay v. Tenn. Valley Authority*, 339 F.3d 454, 463 (6th Cir. 2003) (holding that "[t]o avoid a grant of summary judgment on a Title VII claim, a plaintiff must either provide direct evidence of discrimination or establish a prima facie case" under *McDonnell Douglas*).

In the instant case, the comments, if believed, constitute direct evidence of discrimination, which in turn requires the denial of summary judgment, because Bussell's Adecco supervisor (Karge) told her that she was not going to get a permanent Motorola position – increased pay and benefits – because she "complained too much" (direct evidence of retaliation), Kathy Brodeur's statement that Bussell "was forced out due to continuing harassment" (direct evidence of constructive discharge), Karge's written journal stating that Bussell "resigned due to continuing harassment" (direct evidence of constructive discharge) and both Respondents' findings that she was subjected to sexual harassment constitute direct evidence, and require the denial of summary judgment, concerning Bussell's sexual harassment, retaliation, and constructive discharge claims. *Id.* However, the lower courts did not even discuss the comments. There is clearly a split in the circuits concerning *Seay*, and the law in the Eleventh Circuit applied by the lower courts in this case.

What evidence constitutes direct evidence as opposed to circumstantial evidence is not easy to determine. *Dominguez-Cruz v. Suttle Caribe, Inc.*, 202 F.3d 424, 429 (1st Cir. 2000) (admitting that "[i]t is often quite difficult to draw the line between what is 'direct evidence' and what is 'circumstantial evidence.' "). The standard for what constitutes direct evidence is in conflict in the circuits.

The district courts have cried out for guidance in this area, *see, e.g.*, *Dilla v. West*, 4 F. Supp. 2d 1130, 1137-38 (M.D. Ala. 1998) and *Hearn v. GE*, 927 F. Supp. 1486, 1497-98 (M.D. Ala. 1996), and the *Dilla* case observed that:

> the determination of whether the plaintiffs have established age discrimination by direct evidence is somewhat complicated by the fact that the definition of what constitutes direct evidence of discrimination is subject to frequent shifts, even among different panels of the Eleventh Circuit.

Dilla, 4 F. Supp. 2d at 1137. The *Dilla* court stated that the Eleventh Circuit's different definitions of direct evidence were full of "murkiness." *Id.* at 1138 n.9.

The *Dilla* court noted that there seemed to be two different definitions of direct evidence in the Eleventh Circuit. For the first definition, the court cited to *Caban-Wheeler v. Elsea*, 904 F.2d 1549, 1555 (11th Cir. 1990), which applied a relatively broad definition of direct evidence, explaining that "direct evidence relates to actions or statements of an employer reflecting a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee."

For the second definition, the court noted that in *Clark v. Coats and Clark, Inc.*, 990 F.2d 1217, 1223 (11th Cir. 1993), the panel stated that direct evidence of employment discrimination is evidence that "is sufficient to prove discrimination without inference or presumption."

Judge Thompson in *Dilla* was greatly troubled by these different and contradictory definitions for direct evidence, and asked several rhetorical questions in his opinion, as follows:

> [I]t is unclear what the Eleventh Circuit meant by its narrower definition that direct evidence is "evidence sufficient to prove discrimination without inference or presumption." *Clark*, 990 F.2d at 1223. Does the definition mean that the evidence is sufficient if it reflects, without inference or presumption, a mere discriminatory bias toward the group to which the employee belongs, in other words, that the evidence need only reflect a general discriminatory bias? Or does the direct evidence definition require more, that is, that the evidence must reflect, without inference or presumption, a specific discriminatory intent to commit the challenged conduct?

Dilla, 4 F. Supp. 2d at 1138. The court in *Dilla* urged that drawing the distinction between direct and circumstantial evidence in a discrimination case is needless and implausible. *Id.* n.9.

Six years ago, the Eleventh Circuit issued an opinion that was a veritable treatise with respect to the confusion surrounding direct evidence in the Eleventh Circuit. *Wright v. Southland Corp.*, 187 F.3d 1287 (11th Cir. 1999). Unfortunately, however, that opinion was a stand-alone opinion by Judge Tjoflat, as the two other panel members (Judges Cox and Hull) refused to join in the opinion. Consequently, the *Wright* case has not been relied upon by many district courts or subsequent panel opinions. The *Wright* case held that there have generally been two different definitions used by the Eleventh Circuit concerning direct evidence, the "preponderance" definition ("evidence from which a reasonable factfinder could find, by a preponderance of the evidence, a causal link between an adverse employment action and a protected personal characteristic") and the "dictionary" definition ("evidence

that, if believed, proves the existence of a fact in issue without inference or presumption"). *Wright*, 187 F.3d 1287, 1294. The *Wright* court concluded that the preponderance definition was the law of the Eleventh Circuit. Nevertheless, after *Wright*, panels of the Eleventh Circuit have continued to hold that the dictionary definition of direct evidence is applicable. *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1087-88 (11th Cir. 2004).

Because of the inconsistencies as to the definition of direct evidence in the Eleventh Circuit panel opinions, there are published opinions with almost identical facts where one panel opinion holds that the evidence constitutes direct evidence and the other holds that it does not. *Compare Buckley v. Hospital Corp. of Am.*, 758 F.2d 1525, 1530 (11th Cir. 1985) (decision-maker's statement that the hospital needed "new blood" and that the plaintiff's advancing age impeded her constituted direct evidence in an age case) *with Damon v. Fleming Supermarkets, Inc.*, 196 F.3d 1354, 1359 (11th Cir. 1999) (decision-maker's statement that "what the company needed was aggressive, young men like [the younger person promoted] to be promoted" was not direct evidence). Bussell has direct evidence in this case, because of the admissions that she was subjected to sexual harassment, she was constructively discharged, and the direct evidence that she was retaliated against "not given the permanent position because she "complained too much" about sexual harassment).

Conflicting understandings of what constitutes "direct evidence" plague other circuits as well. In the First Circuit, "[c]omments which, fairly read, demonstrate that a decisionmaker made, or intended to make, employment decisions based on forbidden criteria constitute direct evidence of discrimination", constitute direct evidence.

Febres v. Challenger Caribbean Corp., 214 F.3d 57, 61 (1st Cir. 2000)

The Third Circuit has noted that "while courts agree on what is *not* direct evidence – *e.g.*, statements by non-decisionmakers, statements by decisionmakers unrelated to the contested employment decision, and other 'stray remarks' – there is no consensus on what is [direct evidence]." *Fakete v. Aetna, Inc.*, 308 F.3d 335, 338 (3d Cir. 2002).

In the Fifth Circuit, "direct and material evidence" of employment discrimination applies to remarks that are: "(1) related to [the protected class of persons of which plaintiff is a member]; (2) proximate in time to the employment action; (3) made by an individual with authority over the employment decision; and (4) related to the employment decision at issue." *Vance v. Union Planter's Corp.*, 209 F.3d 438, 442 (5th Cir. 2000) (citing *Krystek v. University of S. Miss.*, 164 F.3d 251, 256 (5th Cir. 1999)).

In the Sixth Circuit, while "[t]he Supreme Court has now made it clear that 'direct evidence' is not essential to prove a mixed-motive employment discrimination case . . . the various employment-oriented definitions of direct evidence . . . have lingered on." *Peyton v. Kellermeyer Co.*, 115 Fed.Appx. 825, 829, n.1 (6th Cir. 2004). Another panel opinion noted that "[d]irect evidence 'is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions.'" *Weberg v. Franks*, 229 F.3d 514, 522 (6th Cir. 2000) (citing *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 926 (6th Cir. 1999)).

The Seventh Circuit also presents a choice of definitions of "direct evidence": "Direct evidence is evidence

which if believed by the trier of fact, will prove the particular fact in question without reliance on inference or presumption." *Walker v. Glickman*, 241 F.3d 884, 888 (7th Cir. 2001). At the same time, "[d]irect evidence is evidence that "'in and of itself suggests' that someone with managerial authority was 'animated by an illegal employment criterion.'" *Bekker v. Humana Health Plan, Inc.*, 229 F.3d 662, 670 (7th Cir. 2000) (citing *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1044 (7th Cir. 1999) and *Venters v. City of Delphi*, 123 F.3d 956, 972 (7th Cir. 1997)). Foreshadowing Justice Thomas' opinion in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003), the Seventh Circuit has also noted that, where a plaintiff has presented sufficient evidence for a jury to conclude that the employer's decision was motivated by an illegal consideration, "the question [of] whether the bulk of [the plaintiff's] evidence of discrimination is direct or circumstantial . . . is a distinction without legal consequence." *Mathur v. Board of Trustees of South. Ill. Univ.*, 207 F.3d 938, 942 (7th Cir. 2000).

Six years ago in the First Circuit, Judge Selya provided an analysis of the varying approaches the several circuits take toward defining direct evidence in *Fernandez v. Costa Brothers Masonry, Inc.*, 199 F.3d 572, 582 (1st Cir. 1999), dividing the definitions used by the courts as falling under one of three rubrics: A) "classic" ("evidence which, if believed, suffices to prove the fact of discriminatory animus without inference, presumption, or resort to other evidence"); B) "animus plus" ("evidence, both direct and circumstantial, of conduct or statements that (1) reflect directly the alleged discriminatory animus and (2) bear squarely on the contested employment decision"); and C) "animus" (evidence "that as long as [it] is tied to the

alleged discriminatory animus, [] need not bear squarely on the challenged employment decision").

While Justice Thomas' opinion in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003), made clear that direct evidence, however it is defined, is not needed for a plaintiff to obtain a mixed-motive jury instruction, the definition, use, and effect of direct evidence in the summary judgment context of employment discrimination cases remains unclear, with different circuits now rendering differing opinions concerning nearly identical evidence. In particular, because the definition of what constitutes direct evidence bears directly on a court's decision to grant or deny summary judgment, as well as on whether a plaintiff must proceed under a *McDonnell Douglas* pretext framework, guidance as to the effect of properly-defined direct evidence on a defendant-employer's motion for summary judgment would substantially lighten the dockets of the federal courts.

II. THERE IS A SPLIT IN THE CIRCUITS REGARDING THE HOLDING OF *WHITE*, CONCERNING WHAT IS NECESSARY TO ESTABLISH ADVERSE EMPLOYMENT ACTION, BECAUSE OTHER CIRCUITS HAVE FOUND THAT THE TYPES OF ADVERSE EMPLOYMENT ACTION BUSSELL SUFFERED ARE ACTIONABLE, AND CASES SO FOUND EVEN BEFORE *WHITE*.

Despite the evidence in this case that Bussell suffered several different types of adverse employment action, which clearly appear to be actionable under the authority of *White*, and despite how the other circuits have interpreted *White*, the Eleventh Circuit in this case did not

interpret *White* to require that any of the adverse employment action was actionable for retaliation, and held as follows:

> In *Burlington Northern*, the Supreme Court considered the scope of the anti-retaliation provision of Title VII. . . . The Court held that the 'the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace,' and 'the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant.' 126 S. Ct. at 2409. Neither holding applies to Bussell's appeal. The only alleged retaliatory acts of which Bussell complained were employment related, and the alleged retaliatory acts were either not retaliatory or were not acts that 'would have been materially adverse to a reasonable employee.'

This holding requires the Court to resolve a split in the circuits. As set forth below, the other circuits have held that *White* clearly enunciated a new standard for what constitutes adverse employment action, namely, if the adverse employment action could dissuade a reasonable employee into not engaging in protected activity, it is adverse employment action, and the Court should resolve this split.

The original panel of the Eleventh Circuit held, concerning her retaliation claims, that:

> there is no record evidence to support Bussell suffered from an adverse employment action by either of the defendants. We affirm this issue for the reasons set forth in the district court's order.

> There is no record evidence to support a constructive discharge claim. . . . Bussell testified that at the time she resigned from Motorola, the sexual harassment had already stopped. There is no record evidence that she was compelled to leave Motorola at that time.

(*Last Page of Order*). In Bussell's first petition for *certiorari*, she argued (as she had in the lower courts) that she suffered different forms of adverse employment action after she repeatedly complained of sexual harassment, namely, 1) having her pay docked; 2) being given 3-5 times more work; 3) not being made a permanent Motorola employee (with increased pay and benefits); and 4) by being constructively discharged. (*Statement of Facts in Opposition to Summary Judgment* at p. 17, ¶ 138); (*Brief on Merits* 33-34); and (*Certiorari Petition* at p. 13). The facts associated with these forms of adverse employment action will be addressed in turn in this section.

Dock in Pay

Concerning the dock-in-pay claim, Motorola admitted on page 48 of its Response Brief in this Court that Bussell was docked pay, as she lost income because of illness (extreme emotional distress) brought on by the sexual harassment, which resulted in her being sent home without pay. (R2-109-159-60; 161-62; R2-110-213) (indicating she was sent home on several different days without pay even in January, 2001, after her complaints became known to Motorola HR).

Three-five Time Increase In Workload – Being Called a Liar and Baby

Bussell was given more than 3-5 times the work as similarly situated co-workers were given. (R2-109-189-90, 193-94; R2-110-220, 260-64). Bussell's work load began to be increased by Laila Pennington (Bussell's Motorola supervisor) as soon as Bussell complained about her pants being pulled down by Render. (R2-110-260). Bussell immediately complained of the sexual touching to Pennington; however, for the next three months, Bussell continued to be sexually harassed. (R2-109-66-67). When Bussell first told Pennington about the touching, Pennington accused Bussell of lying, and became nasty toward Bussell. (R2-109-67, 69). Bussell described her complaint to Pennington, and Pennington's reaction, as follows:

> I went to her [Pennington]. I was very upset. I said he touched me. I don't know what to do. You know, I told you before. And she said – she said, you're a liar. You're a problem-causer.

(R2-109-69-70). Bussell repeatedly complained about the sexual harassment to Pennington, but every time that Bussell complained, Pennington would call her a liar, a baby, and a problem-causer, and put Bussell down. (R2-109-189). Pennington yelled and screamed at Bussell for no legitimate reason, and attempted to get her into trouble with her Adecco supervisor by contriving poor performance allegations, although Bussell did nothing wrong, and was a good employee. (R2-110-197).

Being Made Permanent Motorola Employee

Bussell missed out on being made a permanent Motorola employee, and the greater pay and health care

benefits associated with that permanent employment, because of her complaints. (R2-159, 168, 169; R2-110-265). Direct evidence of retaliation exists, because Tom Karge (Adecco supervisor) told Bussell that she was not going to be made a permanent Motorola employee (a "Motorolan") "because [she] complained too much." (R2-109-159). On pages 268 and 168, Bussell testified that "Karge told [Bussell] . . . that [she would not be a permanent Motorola employee] because she was complaining. . . . " (R2-110-268, 168). Bussell told HR about Pennington's retaliatory threats, and HR did not deny them. (R2-109-168).

Bussell testified that Karge made it clear that Pennington had the power to prevent Bussell from becoming a permanent employee, as follows:

> A: [After the pulling-down-the-pants incident, which Bussell complained about as being sex harassment]. Yes. I told Tom what had happened. Tom came back to me. All of a sudden, Tom's telling me that both Russ and I are no longer eligible to be made Motorolans because Laila has made it impossible for us.

(R2-109-168). After six to eight months at work, the temporary employees were being made permanent employees. (R2-109-169). Bussell testified as follows:

> Q: Did anyone tell you when you went to Motorola that this was a six-month assignment?
>
> A: Nope. They told us it was temporary, but they said it could be six months to a year to longer, but that we had the opportunity after six months to be transferred to be a Motorolan.

(R2-109-183). Bussell was told that would not get such a position. (R2-109-265).

Constructive Discharge

In Karge's findings concerning the sexual harassment allegations, Karge found that Bussell was constructively discharged, as he wrote the following concerning why he felt she was no longer employed by Defendants: "hostile work environment Reason: Work Conditions was the reason. Resigned due to continuing harassment, and being made to feel uncomfortable. Because the sexual harassment case was so drawn out and not alot [sic] of support in her dept [sic] which was causing her to get ill. . . . " (R2-93-Ex.21) (dated Feb. 2 and 15, 2001). Karge testified that these conclusions were his own, and he agrees with them. (R2-112-173-74). There is additional direct evidence of constructive discharge, because Kathy Brodeur (one of Adecco's managers and Karge's supervisor) testified that Bussell did not quit. (R2-99-92). Brodeur believes that Bussell was essentially forced out of her employment "due to continuing harassment." (R2-99-168).

Bussell plainly testified that she was not given an opportunity to have a safe harassment-free environment at Motorola. (R2-109-174). On January 26, 2001, Karge told Bussell that he would no longer give any of Bussell's notes to HR, that they did not like the fact that Bussell was still complaining, he told Bussell that HR was not going to help her, to stop complaining, to get over it, to get a new job, and to get a lawyer. (R2-109-126, 128; R2-110-255-56). Karge told Bussell that she would either have to work with Render, work with Pennington, or leave employment with the Defendants. (R2-109-126-27, 162; R2-110-216, 253).

Karge told Bussell that he would "write a letter that says it was a forceful quit . . . [t]hat [Bussell] was forced to leave [her] job because of unhealthy circumstances, because they couldn't protect her from sexual harassment, [and] because they couldn't protect [Bussell] from retaliation. . . . " (R2-109-127). Kathy Brodeur did not allow Karge to give such a letter to Bussell. (R2-110-212-13).

On January 31, 2001, Pennington had treated Bussell extremely rudely. (R2-110-250-51) (stating that Pennington "ripped [Bussell] to shreds that day in front of so many people"). Pennington screamed at Bussell for no apparent reason. (R2-110-251-52). Bussell drafted a handwritten note describing some of Pennington's obviously retaliatory behavior (R2-93-Ex.26), and testified she told Karge on Jan. 31, 2001, it was obvious Pennington was attempting to force her to quit. (R2-110-253).

While below Adecco argued that the harassment stopped by December 2000 (*Response to Cert. Petition* at 9-10), there is disputed evidence concerning that issue, because Karge admitted that Bussell was still complaining about sexual harassment after the December 26, 2000, meeting she had with Covington. (R-112-133-34).

All of these arguments (concerning the various instances of adverse employment action) were clearly raised below. *See Bussell's Statement of Disputed Facts in Opposition to Defendants' Motions for Summary Judgment* (pp. 13, 15, 16, 127, 18; ¶¶ 88, 114-16, 120, 125-27, 135), and *Memorandum of Law in Opposition to Summary Judgment* (pp. 2, 8, 13-16, 17, and 20), and (*Eleventh Circuit Brief* at pp. 26, 30, 31-32, 33, and 35) (*See generally Reply to Cert. Petition* at 5, 8-9).

The Eleventh Circuit's application of the case of *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405 (2006), requires that the Court provide further guidance, because the panel opinion is contrary to other circuit's cases interpreting *White*. In *White*, this Court was faced with conflicting panel opinions interpreting Title VII's anti-retaliation clause (42 U.S.C. § 2000e-3(a)), specifically concerning the issue of what constitutes adverse employment action (some – like the Eleventh Circuit – required an ultimate employment action, *see Gupta v. Florida Bd. of Regents*, 212 F.3d 571, 587 (11th Cir. 2000), and others required merely conduct designed to dissuade an employee from complaining about discrimination). *Id.* at 2408. This Court noted that the anti-retaliation clause forbids an employer from "discriminate[ing] against" an employee because that individual "opposed any practice" made unlawful by Title VII. *Id.* The Court held that a plaintiff need only show that

> a reasonable employee would have found the challenged action materially adverse, "'which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'"

Id. at 2415 (citations omitted). Notably, the Court held that the anti-retaliation clause prohibits "employer actions that are likely to deter victims of discrimination from complaining to the EEOC, the courts, and their employers." *Id.* (citing 2 *EEOC Compliance Manual* § 8. pp. 8-13 (1998 ed.)).

In *White*, the defendant, after the plaintiff complained of sex discrimination and harassment, reassigned her job duties, by taking her forklift duties (which she enjoyed and which were her primary duty) and giving her more

general laborer duties, and by suspending her for 37 days *with* pay. To give the courts guidance, the Court gave examples of what it believed constitutes adverse employment action for purposes of the anti-retaliation clause, and it held that the following two examples constitute adverse employment action: 1) a schedule change in an employee's work schedule, if the worker needed a certain schedule because of child-care concerns, and 2) the exclusion of an employee from a weekly training lunch that contributes to professional development. The Court specifically agreed with the EEOC's Compliance Manual which states that "retaliatory work assignments [are] a classic and widely recognized example of forbidden retaliation." *Id.* at 2416 (citing *EEOC Compliance Manual* § 614.7 (1991 ed.)). The Court also approved of the EEOC's enjoining employers from assigning unpleasant work assignments on employees who have complained about discrimination. *Id.*

Following *White*, and even pre-*White*, numerous court of appeals decisions hold, contrary to the Eleventh Circuit's holding in this case, that actions that result in tangible economic consequence (loss in pay), failure to promote, verbal abusive harassment, and constructive discharge are materially adverse employment actions that are actionable. *Rivera-Martinez v. Commonwealth of Puerto Rico*, 2007 WL 16069 (1st Cir. 2007) (holding so for demotions affecting pay, refusals to promote, and "toleration of harassment by other employees"); *Noviello v. City of Boston*, 398 F.3d 76 (1st Cir. 2005) (holding that the creation of and perpetuation of hostile work environment constitutes actionable retaliation); *Kessler v. Westchester County Dep't of Soc. Servs.*, 461 F.3d 199, 207 (2d Cir. 2006) (holding so for termination, wage loss); *Hare v. Potter*, 2007 WL 841031 (3d Cir. 2007) (failure to promote

and retaliatory harassment); *Csicsmann v. Sallada*, 2006 WL 3611729 (4th Cir. 2006) (holding so for negative change in salary, benefits, and promotional opportunities); *Schmidt v. Canadian Nat'l Ry. Corp.*, 2007 WL 755171 (7th Cir. 2007) (recognizing that dock in pay constitutes actionable retaliation); *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 965 (9th Cir. 2004) (holding that verbal abuse and intimidation constitutes retaliation); *McGowan v. City Eufala*, 472 F.3d 736, 742 (10th Cir. 2006) (holding so for firing, failure to promote, change in benefits).

Almost without exception, the above cases note that the standard enunciated in *White* rejected the old approach that there must be an ultimate employment action for retaliation causes of action, but rather simply actions that might well dissuade a reasonable person from engaging in protected activity, and that such actions may include those that take place outside the workplace. *See, e.g., McCullough v. Kirkum*, 2006 WL 3786043 *3 (5th Cir. 2006). For some reason, the Eleventh Circuit eschews this clear change in legal standard, and is applying the old ultimate employment action standard, which requires further guidance.

In this case, Bussell was retaliatorily assigned 3-5 times more work shortly after she complained of sexual harassment. The manner in which the extra work was assigned was done so in a spiteful way and affected Bussell to the extent that a jury could find that such extra work was clearly adverse employment action, and Pennington's calling Bussell a "baby" and a "liar" and screaming at her for complaining of harassment would deter a reasonable employee from complaining.

Concerning the docking in pay, Bussell clearly suffered adverse employment action, and Motorola admitted that Bussell had her pay docked. (*Motorola's Brief to Eleventh Circuit* at 48) (citing R2-78-159-161). Under *White*, clearly economic loss *per se* requires the conclusion that a jury could find adverse employment action, because the Court found that retaliation may lie without it.

Along those same lines, Defendants' failure to make Bussell a permanent Motorola employee constitutes adverse employment action. Bussell testified that Karge made it clear that Pennington had the power to prevent Bussell from becoming a permanent employee, and that she exercised that power. (R2-109-168-69, 183, 265). Failure to make Bussell a permanent employee is very much akin to a failure to promote that resulted in economic harm to Bussell and is clearly actionable. *Carter v. Three Springs Residential Treatment*, 132 F.3d 635 (11th Cir. 1998) (holding that failure to promote is an actionable adverse employment action under Title VII), and when she was sent home without pay. *Doe v. Dekalb County Sch. Dist.*, 145 F.3d 1441 (11th Cir. 1998) (holding that adverse employment action which causes economic loss is *per se* and adverse employment action for purposes of this second element, citing prior Eleventh Circuit cases).

The proffer of direct evidence (the comments from Karge and Pennington concerning the failure to make Bussell a permanent employee, the findings of constructive discharge by Karge and Brodeur, and Motorola's admission in its Brief on the Merits that Bussell was docked pay) requires that summary judgment be denied on those issues. *Bass v. Orange County Commission*, 256 F.3d 1095, 1112 (11th Cir. 2001) (holding that "where the nonmovant presents direct evidence . . . summary judgment is

not appropriate"). It is reversible error to apply the *McDonnell Douglas* inferential model when there is direct evidence of discrimination. *Caban-Wheeler v. Elsea*, 904 F.2d 1549, 1555 (11th Cir. 1990).

Defendants argued below that nowhere in the record is there evidence Pennington could have made the decision to promote Bussell into a permanent Motorola employee. Defendants are looking at the situation backwards. The question is not whether Pennington had that authority (although the above evidence indicates she did) the question is whether Pennington could have made sure that Bussell was not made permanent, such as by disciplining her. Bussell testified that as soon as she told Karge that Render pulled her pants down, Karge went and talked to Pennington and then told Bussell that Pennington told him that she was going to make it impossible for Bussell to become a permanent employee. (R2-109-167-68). Pennington thus had the means to make sure that Bussell could not become a permanent employee. Bussell also testified that she was told by her supervisors that she was one of the best employees that the Defendant had, and that she could become a permanent Motorola employee within six months of her hire. (R2-109-177, 183).

Questions of fact exist as to whether Bussell was constructively discharged (a form of retaliation), because of Kathy Brodeur's testimony (which constitutes direct evidence, as does Karge's finding that she was forced out due to continuing harassment) that Bussell was essentially forced out "due to continuing harassment (R2-99-92), Karge's admission that Defendants could not protect Bussell from harassment or retaliation (R2-109-127), and Karge's statement that Bussell could either continue to work for Pennington (the individual retaliating against

her and calling her names for complaining), Render (the sexual harasser), or she could leave. (R2-109-126-27, 162; R2-110-216, 253). A reasonable jury could find retaliatory constructive discharge based on these facts. Accordingly, the Court should grant certiorari to resolve this important conflict.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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May, 2007

2006 WL 4476198

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 04-12120

D.C. Docket No. 02-60019-CV-SH

MEGHAN BUSSELL,

Plaintiff-Appellant,

versus

MOTOROLA, INC.,
a Delaware Corporation,
ADECCO EMPLOYMENT SERVICES, INC.,
a Delaware Corporation,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(December 21, 2006)

ON REMAND FROM THE
SUPREME COURT OF THE UNITED STATES

Before DUBINA and PRYOR,* Circuit Judges.

PER CURIAM:

This appeal is before us on remand from the Supreme Court of the United States with instructions to reconsider our panel opinion decision, 141 Fed. Appx. 819 (11th Cir. 2005), in the light of *Burlington Northern and Santa Fe Railroad Co. v. White*, 126 S. Ct. 2405 (2006). *Bussell v. Motorola, Inc.*, ___ S. Ct. ___, 2006 WL 2794976 (2006) (mem). After consideration of the supplemental briefs, we reinstate our previous decision because it is not affected by *Burlington Northern*.

In *Burlington Northern*, the Supreme Court considered the scope of the anti-retaliation provision of Title VII, 42 U.S.C. § 2000e-3(a). The Court held that "the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace," and "the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant." 126 S. Ct. at 2409. Neither holding applies to Bussell's appeal. The only alleged retaliatory acts of which Bussell complained were employment related, and the alleged retaliatory acts were either not retaliatory or were not acts that "would have been materially adverse to a reasonable employee."

OPINION REINSTATED.

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* Due to the death of Honorable Paul H. Roney, United States Circuit Judge for the Eleventh Circuit, on 16 September 2006, this decision is rendered by a quorum. 28 U.S.C. § 46(d).

Supreme Court of the United States

No.

05-1051

MEGHAN BUSSELL,

Petitioner

v.

MOTOROLA, INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Eleventh Circuit.

THIS CAUSE having been submitted on the petition for a writ of certiorari and responses thereto.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the petition for a writ of certiorari is granted. The judgment of the above court is vacated with costs, and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Burlington N. & S. F.R. Co. v. White*, 548 U.S. ___ (2006).

IT IS FURTHER ORDERED that the petitioner Meghan Bussell recover from Motorola, Inc., et al., Three Hundred Dollars ($300.00) for costs herein expended.

October 2, 2006

Clerk's costs: $300.00

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-12120-HH

MEGHAN BUSSELL,

Plaintiff-Appellant,

versus

MOTOROLA, INC.,
a Delaware Corporation
ADECCO EMPLOYMENT SERVICES, INC.,
a Delaware Corporation,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

(Filed Feb. 15, 2007)

Before: DUBINA and PRYOR*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35,

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* Due to the death of Honorable Paul H. Roney, United States Circuit Judge for the Eleventh Circuit, on 16 September 2006, this decision is rendered by a quorum. 28 U.S.C. § 46(d).

Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ William H. Pryor, Jr.
UNITED STATES
CIRCUIT JUDGE